IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 462

RICHARD A. KNIGHT,

Petitioner,

AGAINST

THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

Petition and Brief in Support of Writ of Certiorari to the Court of Appeals of the State of New York.

RICHARD A. KNIGHT,
Petitioner in Person,
32 Broadway,
New York City,
New York.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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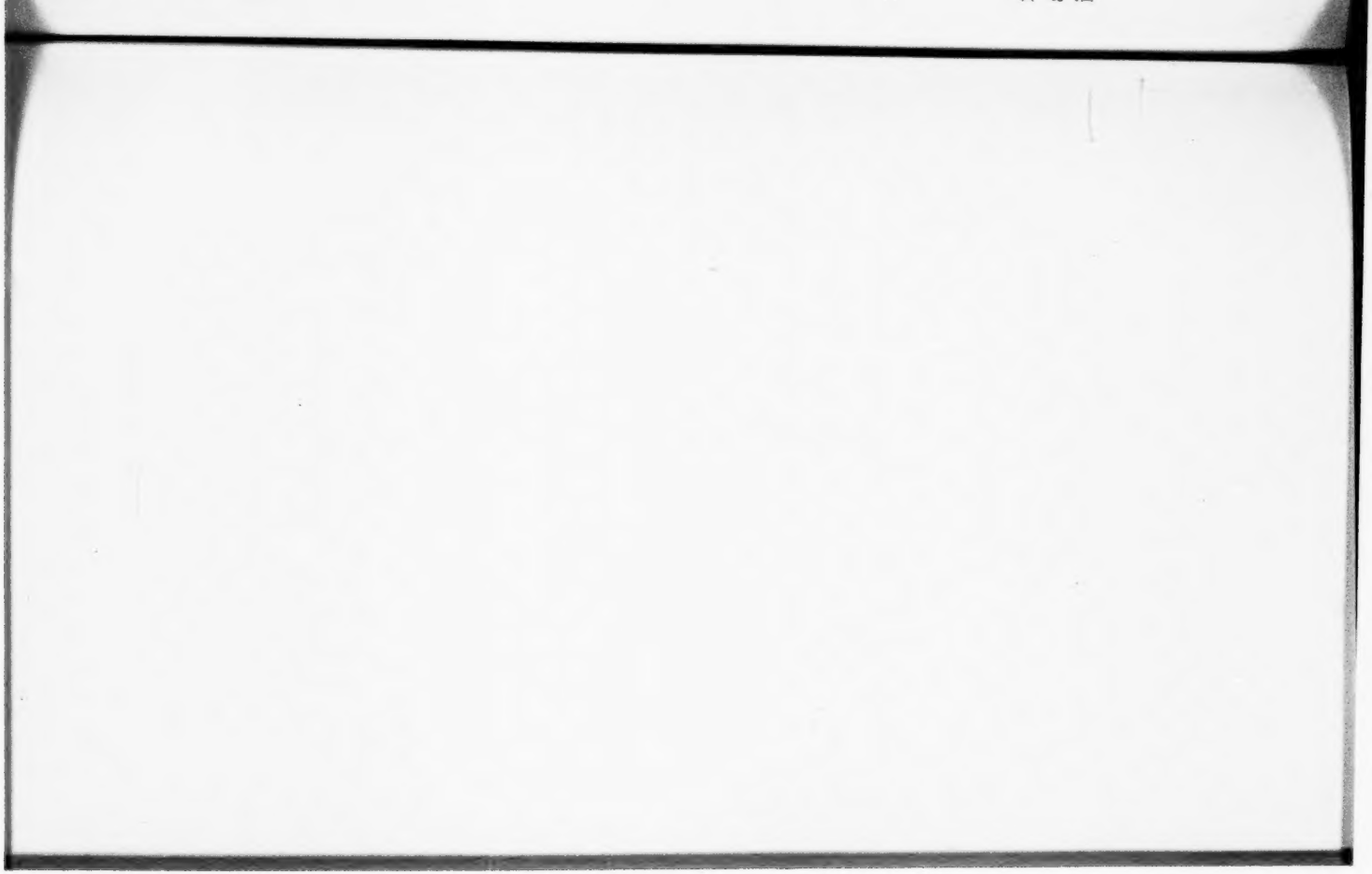

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

RICHARD A. KNIGHT, *Petitioner,* AGAINST THE BAR ASSOCIATION OF THE CITY OF NEW YORK.	No. .....

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Richard Knight, petitioner, prays that a Writ of Certiorari issue to the Court of Appeals of the State of New York in the above entitled action and respectfully shows:

Jurisdiction.

The Writ is sought because a State Court has decided federal questions of substance in a way not in accord with applicable decisions of this Court and because of the importance of those questions.

Summary Statement of the Matter Involved.

By an order dated May 8th, 1942 (Rec. p. 2) of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, petitioner was disbarred from practicing law in the State of New York.

The authority, if any, for this order and for the proceeding in which it was entered is Section 88 (2) of the Judiciary Law of the State of New York, the pertinent part of which reads:

> "The Supreme Court shall have power and control over attorneys and counsellors-at-law and the Appellate Division of the Supreme Court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor or any *conduct prejudicial to the administration of justice.*" (Italics ours.)

The proceeding was instituted by the Association of the Bar of the City of New York (hereinafter called the Association) with the service on petitioner of a Notice of Motion and a Petition (Rec. pp. 13-113) by John T. Cahill, an attorney acting for the Association.

There is no provision contained in the Charter of this Association nor in any law of the State of New York authorizing it to institute such a proceeding in such a manner.

On the other hand, Section 476 of the Judiciary Law of the State specifically provides that a disciplinary proceeding against an attorney may be instituted only at the

direction of an Appellate Division and may be prosecuted only by an attorney nominated by it.[1]

The charges, six in number, contained in the Petition were that, on successive dates, this petitioner had caused to be printed and disseminated a series of six public letters, each of which, insofar as it referred to judges of the State of New York, constituted (and the Petition here employs the exact words of Section 88 (2) of the Judiciary Law quoted *supra*) "conduct prejudicial to the administration of justice".

It was not charged in the Petition that any statement referring to any judge contained in any of the letters was untrue or unjustified.

It was not charged that any statement in any letter referred to any judge before whom there was pending at the time of its publication, a judicial proceeding, the determination of which it was the purpose of such letter to affect and, in fact, no such judicial proceeding was pending.

On March 23rd, 1942 Charles B. Sears, as official Referee, filed with the Appellate Division, his Referee's

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1. The pertinent parts of this section read as follows:

"Section 476: Suspension or Removal of Attorneys Must Be on Notice: Before an attorney or counsellor at law is suspended or removed as prescribed in Section 88 of this chapter, a copy of the charge must be delivered to him personally within or without the State or, in case it is established to the satisfaction of the presiding justice of the Appellate Division, Supreme Court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the presiding justice may direct and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any District Attorney within a department, when so designated by the presiding justice of the Appellate Division of the Supreme Court to prosecute all proceedings for the removal or suspension of attorneys and counsellors at law or the presiding justice may, in a county wholly included within a City or in a county having a population of over 300,000 inhabitants, appoint an attorney and counsellor at law designated by a duly incorporated Bar Association approved by him, to prosecute any such proceedings and upon the termination of the proceedings may fix the compensation to be paid to such attorney and counsellor at law for the services rendered under such designation which compensation shall be a charge against the county specified in his certificate and shall be paid thereon."

Report (Rec. p. 117) in which he found that the printing and publication of each of the letters by petitioner, insofar as it referred to judges of the State of New York, constituted "conduct prejudicial to the administration of justice".

The Referee did not find, however, that any statement contained in any of the letters referring to such judges was untrue or unjustified and no charge was ever made before him and no evidence presented to him which established or even purported to establish that any such statement was untrue or unjustified (Rec. pp. 122-219).

On April 24th, 1942, in opposition to the Association's motion to confirm the Referee's Report, petitioner filed an affidavit (Rec. p. 222) in which he not only called these circumstances to the attention of the Appellate Division but in which he unqualifiedly swore (Rec. p. 235) that every statement he had made in reference to any judge in any of the letters was true and justified and challenged the Association to call the attention of the Court and requested the Court to require the Association to call its attention to any such statement which was not true and not justified.

The Association made no Answer of any kind to this affidavit although it obtained two adjournments of the return day of the motion, professedly for the purpose of making such Answer. And the Appellate Division finally, without requiring it to make any such Answer, confirmed the Report of the Referee.

Two weeks later, the Appellate Division filed its Opinion and entered its Decree disbarring petitioner.

Although the only charges made against petitioner were that, in writing and publishing statements concerning the conduct of Judges of the State of New York in proceedings which were no longer pending before them, he had been guilty of "conduct prejudicial to the administration of justice" and although this was the sole finding

of the Referee, the Appellate Division's Opinion (Rec. p. 239) is notable for its findings, in the absence of any evidence whatever and in the absence of any corresponding findings of the Referee, that the Judges who were attacked in the letters had "fearlessly performed their judicial duties and refused to be intimated or coerced by" the petitioner (Rec. p. 246, fol. 737) and that "the theme of all his publications is a scandalizing of the Courts" (Rec. p. 246, fol. 738) because "in the performance of their duties they had refused to acquiesce in his conclusions" (Rec. p. 243, fol. 728) and finally that petitioner had been "guilty" of "gross, moral turpitude" (Rec. p. 250, fol. 750).

From the order of disbarment (Rec. p. 2) petitioner appealed to the Court of Appeals by Notice dated June 23rd, 1942 (Rec. p. 1).

Thereafter, the Association moved the Court of Appeals for an order dismissing the Appeal (Rec. p. 266) and on June 10th, 1943 after argument and submission of briefs in which were raised all the federal questions here raised, an order was made granting the motion.

By reason of that order, the jurisdiction of this Court has been invoked.

Statement Particularly Disclosing the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Order in Question and the Questions Presented and the Reasons Relied on for the Allowance of the Writ.

Petitioner urges that the Court of Appeals erred:

1. Because Section 88 (2) of the Judiciary Law of the State of New York, as interpreted by the Court below, constitutes a violation of petitioner's right of free speech and free press and is, therefore, unconstitutional, as is likewise the order of disbarment and for the same reasons.

2. The proceeding instituted against petitioner was unauthorized by the law of the State of New York and was in contrariety to that law and was a violation of petitioner's right to due process and so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The honesty of the Appellate Division, First Department, prior to its taking jurisdiction of the proceeding against petitioner, had been repeatedly and publicly challenged by petitioner. So that even if the jurisdiction which it took had not been a violation of due process of law, *per se*, its taking it under such circumstances would have been and would have constituted a departure from the accepted and usual course of judicial proceedings so drastic as to call for an exercise of this Court's power of supervision.

4. The Association was wholly without authority even under the terms of its own By-laws to have instituted the proceeding in the circumstances in which it did institute it and its being permitted by the Court below to do so was, therefore a violation of due process and constituted so drastic a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York in case No. 86 (290 N. Y. 871) commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the Record and all proceedings in the case of the Bar Association of the City of New York against Richard A.

Knight and that the order of the Court of Appeals of the State of New York may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

Dated, New York, New York, October 27th, 1943.

RICHARD A. KNIGHT,
Petitioner in Person.

Certificate.

I hereby certify that I have prepared the foregoing Petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and it is not filed for the purposes of delay.

RICHARD A. KNIGHT,
Petitioner in Person,
32 Broadway,
New York, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

RICHARD A. KNIGHT,
Petitioner,

AGAINST

THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

No. .....

Brief in Support of Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

POINT I.

The order of disbarment and Section 88 (2) of the Judiciary Law of the State of New York by which it purports to have been authorized, constitute violations of petitioner's right of free speech and free press and are, therefore, unconstitutional.

It is not claimed by the Association that there was any reference in any of petitioner's letters to any judge before whom there was any litigation pending to which the letters referred and, in fact, there was not. In the words of the dissenting opinion in *Bridges* v. *California* (314 U. S. 252), there was no "threat to litigation obviously

alive", no decision was "hanging in the judicial balance" and there was no "real and substantial threat to the impartial decision by a Court of a case actively pending before it".

Similarly, it is not claimed by the Association and was not found by the Referee that there was any statement made in the letters concerning any judge that was untrue or unjustified.

Thus, it is demonstrated that the position taken by the Association and adopted by the Appellate Division and by the Court of Appeals is, simply put, that any lawyer who dares to publish derogatory statements, no matter how true and no matter how justified, concerning any judge, no matter how corrupt and how insolent, may, under the provisions of Section 88 (2) of the Judiciary Law of the State of New York, be disbarred and deprived of his livelihood.

If Section 88 (2) of the Judiciary Law authorizes such a position, it manifestly (again to quote the dissenting opinion in *Bridges* v. *California, supra*) "places an indiscriminate ban on public expression that operates as an overhanging threat to free discussion" and "it must fall without regard to the facts of the particular case. *This is true whether the rule of law be declared in a statute or in a decision of a Court. Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. ed. 103, 60 S. Ct. 736; *Cantwell* v. *Connecticut,* 310 U. S. 26, 84 L. ed. 1213, 60 S. Ct. 900, 128 Alr. 1352."

Although petitioner's insistence here upon the truth of the statements contained in the letters is unremitting, it is, nevertheless, significant that in the dissenting opinion above quoted the position was taken that the question of the truth or falsity of the statements in such a case is unimportant. Specifically, in this connection the Court said:

> "Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered."

The final word, however, in support of petitioner's position was uttered in the majority opinion in the same case of *Bridges* v. *California* where the Court said:

> "For the First Amendment does not speak equivocally. It prohibits 'any law abridging the freedom of speech or of the press'. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

POINT II.

The proceeding in the Court below was unauthorized by the law of the State of New York and was in contrariety to that law and was a violation of due process and departed so drastically from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The proceeding was instituted by the service on petitioner on or about December 26th, 1941 of the Petition and, not an order to show cause, but a mere Notice that the matter would be presented to the Appellate Division, First Department, on January 9th, 1942.

The papers were served by John T. Cahill, as attorney for the petitioner although Cahill had not been appointed by the Appellate Division, First Department, to serve them or to prosecute the proceeding.

That Court had not otherwise authorized the proceeding and had conducted no preliminary investigation into the charges contained in the Petition before its service.

It is the unquestionable law of New York that a disciplinary proceeding against an attorney may be instituted *only* by the affirmative act of an Appellate Division.

No Bar Association, no attorney nor any other person may institute such a proceeding.

That this is the law was clearly laid down by the Appellate Division, First Department, itself as long ago as 1877 in *Matter of Brewster* (12 Hun 109) wherein the Court said:

> " * * * all proceedings to disbar or suspend attorneys and counsellors should originate in the action of the Court itself. Attorneys or parties are not at liberty to commence such proceedings by motion and notice. But every person who desires such an investigation should, in the first instance, present to the Court affidavits or other authenticated papers for its examination *preliminary to any proceeding.* (Anonymous, 22 Wend. 656; *In re Percy,* 36 N. Y. 651; *In re Petersen,* 3 Paige 510.)
>
> "The Court will in all cases give careful consideration to the charges and, if satisfied of their probable truth and that they are of sufficient importance to call for answer and investigation, *will institute the proceedings of its own motion* in the form prescribed and *required* formerly by the Revised Statutes and now by the Code of Civil Procedure. (1 R. S. 109, Sections 24, *et seq.;* Sections 67 and 68 Code Civ. Proc.) (Author's Note: Sections 67 and 68, Code Civ. Proc. are now incorporated in Sections 88, 476 and 477 of the Judiciary Law.)

> "In no other way can the reputation of attorneys be protected from the improper assault of interested or malicious persons. It is the duty of the Court scrupulously to guard against such attacks and for that reason *departures from the correct and safe practice will not be tolerated.*
>
> "In this case an attorney gave notice of a motion, on behalf of his client, for an order that the respondent show cause why an order should not be made striking his name from the roll for certain alleged acts of misconduct set forth in the papers; and the papers on which the motion is founded and those made in opposition have been submitted to the Court. *The motion ought properly to be dismissed for irregularity.*"

It is difficult to conceive of how any Court could have made the law of a proceeding of this character more clear than did the Appellate Division in the categorical opinion above quoted.

The Reports, moreover, fail to disclose a single case in which that Court has ever intimated that its conception of the law as above set forth is in any particular changed.

Despite this fact, when petitioner appeared specially at the commencement of this proceeding and moved for its dismissal on the ground that the Association was wholly without authority to have instituted the proceeding on notice and that its attorney, Cahill, not having been directed by he Appellate Division, First Department to serve and prosecute the charges, was wholly without power to do so, that Court, without opinion, summarily dismissed the motion.

The provisions of Sections 67 and 68 of the Code of Civil Procedure which the Court in the opinion quoted above found "require" a proceeding of this character to be instituted *only* upon the motion of an Appellate Divi-

sion, are now Sections 88, 476 and 477 of the Judiciary Law and appear there unchanged insofar as they are pertinent to the issue here presented. So that there can be no contention that the ruling of the Court below on petitioner's motion to dismiss this proceeding for irregularity was attributable to any change in the statutory law.

On the contrary, that law, as set forth in Section 476 is explicit and emphatically sustains the position here taken that a disciplinary proceeding may be instituted *only* by an Appellate Division and prosecuted *only* by an attorney designated by the presiding justice thereof.

The pertinent part of Section 476 reads as follows:

> "SECTION 476: SUSPENSION OR REMOVAL OF ATTORNEYS MUST BE ON NOTICE. Before an attorney or counsellor at law is suspended or removed as prescribed in Section 88 of this chapter, a copy of the charge must be delivered to him personally within or without the State or, in case it is established *to the satisfaction of the presiding justice* of the Appellate Division Supreme Court *to which the charges have been presented,* that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise *as the presiding justice may direct* and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any District Attorney within a department, *when so designated by the presiding justice* of the Appellate Division of the Supreme Court to prosecute all proceedings for the removal or suspension of attorneys and counsellors at law *or the presiding justice may,* in a county wholly included within a City or in a county having a population of over 300,000 inhabitants, *appoint an attorney and counsellor at law* desig-

> nated by a duly incorporated Bar Association *approved by him,* to prosecute any such proceedings and upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor at law for the services rendered *under such designation* which compensation shall be a charge against the county specified in his certificates and shall be paid thereon."

The passages italicized by us in the above, certainly leave no room for doubt that the indisputable intendment of the statute is that charges in a disciplinary proceeding against an attorney in the State of New York may be served upon and prosecuted against him *only upon the express order of the presiding justice* of an Appellate Division of the Supreme Court and that no other person may serve and undertake to prosecute such charges without the authority of such an order.

The decisions of the other Courts of the State in connection with this matter are as explicit and unmistakable as this statute and as the decision of this Court in *Matter of Brewster, supra.*

The decisions of the Appellate Division, Second Department on the point are numerous:

In *Matter of Brooklyn Bar Association* v. *Valentine,* 92 App. Div. 612 (1904) the Court held:

> "After the *preliminary examination* of the verified petition which has been presented to the Appellate Division in this matter, the *prescribed method of procedure in cases of this kind requires the issuance of a formal order directing the accused attorney to show cause* why he should not be suspended from practice or removed from office (*Anonymous,* 22 Wend. 656; *Matter of Percy,* 36 N. Y. 651; *Matter of Brewster,* 12 Hun 109; *Matter of Eldredge,*

> 82 N. Y. 161). That course will be pursued in the present case, and if, upon the return of the order to show cause the attorney makes the same denials which he has already made informally, the matter will be sent to a Referee to take testimony in accordance with the practice approved by the Court of Appeals in the *Eldredge* case."

To the same identical effect, cf. the following:

> *Matter of Eugene Hayne*, 92 App. Div. 612;
> *Matter of James A. Murtha, Jr.*, 92 App. Div. 612;
> *Matter of Albert M. Fragner*, 92 App. Div. 612.

A decade after the cases immediately above, the law was again specifically laid down to the same effect by the same Court. In *Matter of Wilson*, 158 App. Div. 607 (Second Dept., 1913), on the application of an attorney for an inquiry into his own professional conduct of a litigation, the Court said:

> "Under subdivision 2 of Section 88 of the Judiciary Law, it is our duty, upon presentation of any matter which may or might require disciplining of an attorney and counsellor, to examine it and *if we determine that it requires investigation to cause the institution of proceedings.* Such proceedings contemplate presentation of charges to be delivered to the attorney to whom must be afforded an opportunity of being heard in his defense.
>
> "We think that the subject matter here justifies such proceedings as are prescribed by the judiciary law. The Court designates William C. Dykeman and Stanley C. Baldwin to prepare charges in the premises and report them to this Court for its action."

It is the decisions of the Court of Appeals, however, which obviate any possibility of the interpretation of the law here insisted upon being reasonably disputed. In case after case, that Court has uniformly held that *a disciplinary proceeding may be instituted only by an Appellate Division through the instrumentality of an order to show cause.*

In *In re John Percy,* 36 N. Y. 651 (1867), the Court of Appeals held:

> "No question is made as to the correctness of the practice adopted in bringing the matter before the Court. *That was an order to show cause,* founded upon the papers presented, served with the papers personally upon the appellant."

In the same case further along in the opinion the Court stated:

> "The Court may and *ought* to cause the charges to be preferred whenever satisfied from what has occurred in its presence or from any satisfactory proof that a case exists where the public good and the ends of justice calls for it."

The foregoing case was cited as the law of this State by the Court of Appeals in *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465 (1928) where it said at page 477:

> "The power of the Court in the disciplining of its officers is in truth a dual one. *It prefers the charges and determines them.* * * * Preliminary *investigation there must be,* at least to some extent before a decision can be reached whether to prosecute at all."

To the same effect is the opinion of the Court of Appeals in *Matter of Dolphin,* 240 N. Y. 89 (1925) wherein that Court stated:

> "* * * it seems to us quite clear the Association simply discharges the duty of calling to the attention of the Appellate Division under our law charged with the duty of supervising the conduct of attorneys, some alleged misconduct *and then, if the Appellate Division thinks that course should be pursued,* discharges the further duty of prosecuting the accusation and presenting the evidence which will enable the Court finally to decide whether it should exercise its disciplinary powers * * *."

The foregoing cases demonstrate it to be beyond reasonable dispute that a disciplinary proceeding against an attorney may be instituted *only* by the Appellate Division upon an order to show cause. And it is of interest to note that the Association has in these proceedings proved wholly unable to quote a single case or to advance a single comprehensible argument to sustain its unauthorized course in bringing the proceeding on by a Notice through the agency of an attorney specially employed by it for the purpose who has, of course, never even pretended that he had been designated for the purpose by the presiding justice of the Appellate Division, First Department.

It has conceded in its briefs that "up to about 1904 the practice generally followed for the institution of disciplinary proceedings was by way of an order to show cause. This practice has, however", it has said, "long been outmoded".

It has omitted to say, however, that the practice has "long been outmoded" *only* in the County of New York of all the Counties of the State and *only* by the Bar Association of the City of New York of all the Bar Associations

in the State and *only* by the Appellate Division, First Department of all the Appellate Divisions in the State.

It has further omitted to point out that the "outmoding" was occasioned or is to be justified by any change in the statutory law of the State and that it was based simply upon the arrogation to itself by the Association of a privilege unaccorded it by law.

The law as interpreted by the Court of Appeals is still strictly observed in all the other Departments of the State. In all of them, disciplinary proceedings still are brought on, as they have always been, by an order to show cause made by the Court itself *after a preliminary investigation* of the charges contained in the Petition.

Of great significance in this connection, moreover, is the fact that in the widely publicised disbarment proceeding currently pending before the Appellate Division, First Department against former Magistrate Thomas Aurelio, both the Association and the Appellate Division have dropped their impudent pretense that a law can be nullified a la mode and for the first time in 39 years, have scrupulously followed the process here outlined by your petitioner as the only due process authorized by the laws of New York State. Specifically, the Association, in proceeding against Aurelio, submitted its Petition, accompanied by an Order to Show Cause, to Presiding Justice Francis Martin whereupon that crudely-cast adornment of the bench and the back-rooms, demonstrating that shame at length had come to Shanteytown, duly signed the order to show cause and, upon its return, duly and, for a change, legally nominated the District Attorney of New York County to prosecute the charges contained in the Petition.

So that the fact is that the Appellate Division, First Department, since its lawless disposition of the present case, has forsaken lawlessness or, in any event, one type of lawlessness and has returned into the fold, along with

the other Appellate Divisions of the State and now conducts disciplinary proceedings in accordance with law.

Its action in the *Aurelio* case is surely a public admission that its action in the present case was indefensible and that it was wholly without authority to have entertained it at all.

It is elementary that a decree in a proceeding which a Court is without authority to entertain is a total nullity.

In *Matter of Will of Walker,* 136 N. Y. 20 (1892), this Court said

> "The objections to this decree are jurisdictional. The consent of the parties is not sufficient to avoid their fatal effect. *Wherever there is a want of authority to hear and determine the subject matter of the controversy,* an adjudication upon the merits is a nullity and does not estop an assenting party. (Citing 8 N. Y. 254, *Chemung Canal Bank* v. *Judson.*)"

Cf. also:

> *Matter of Doey,* 224 N. Y. 30;
> *Matter of Newham,* 232 N. Y. 37 (1921);
> *Matter of Samson,* 265 A. D. 259.

In the last mentioned case (*Matter of Samson*) the petitioner, Samson, sought a review under Section 78 of the Civil Practice Act of the determination of the Board of Regents of the University of the State of New York suspending his license to practice accountancy on the ground that the hearings on the charges against him had been conducted before a sub-committee of two, despite the requirement of the Education Law that such a hearing must be conducted by a committee of "not less than three members of the Regents". The Court, in sustaining the prayer of the petition, said:

> "I believe, furthermore, that it is fundamental that a question of jurisdiction is involved that is not subject to waiver by either party. It was held in *Matter of Newham* v. *Chile Exploration Co.*, 232 N. Y. 37 at page 24 that 'it is elementary that no agreement, waiver or stipulation could confer upon the State of New York or its Courts or commissions jurisdiction which it does not and cannot possess'. * * * The position and powers of the Regents, like the position and powers of this Court, are legislatively created. * * * They simply do not exist except in accordance with the provisions of law creating them. * * * The determination must accordingly be vacated and the petitioner reinstated."

To the same effect, is the holding of the same Court (Appellate Division, Third Department) in *Matter of Bender,* 262 App. Div. 627 (1941) where it was held that the holder of a license to practice dentistry could not be deprived of it "without due process of law".

That the Supreme Court of the United States, in disciplinary proceedings instituted against members of its Bar, follows the same practice laid down by Section 88 of the Judiciary Law as interpreted by the Court of Appeals and requires the petition to be presented to it and served, if at all, upon the respondent only upon its own order to show cause is demonstrated in *Selling* v. *Radford,* 243 U. S. 46, wherein not only was *the matter brought on by an order to show cause after the presentation to the Court of the petition,* but wherein the Court specifically held that it would not entertain a petition for the disbarment of an attorney which petition was based exclusively upon the record of his disbarment in a State Court if it appeared that the proceeding in the State Court had been "wanting in due process" (as here) and if it appeared that "there was such an infirmity as to facts found (as here) to have

established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject".

It is respectfully submitted that for a disbarment order obtained in a proceeding instituted as this one was to be sustained by this Honorable Court would be as unearthly as would be its sustaining a default judgment entered on a telegraphed summons and complaint.

POINT III.

The honesty of the Appellate Division, First Department, prior to its taking jurisdiction of the proceeding against petitioner, had been repeatedly and publicly challenged by petitioner. So that even if the jurisdiction which it took had not been a violation of due process of law, per se, its taking it under such circumstances would have been and would have constituted a departure from the accepted and usual course of judicial proceedings so drastic as to call for an exercise of this Court's power of supervision.

The prejudice and animosity which motivated the Appellate Division are disclosed not only by its high-handed disregard of the statutory law of the State in its conduct of the proceeding, as demonstrated in Point II supra, but also by the circumstance that, although the truth and propriety of petitioner's statements regarding the judges of the State of New York attacked by him had not been put in issue by the Association in its Petition nor questioned by the Referee in his Report, the Court itself, nevertheless, in its Opinion (Rec. p. 239) unhesitatingly characterized the attacks as "malicious", "vituperative" and finally, categorically as "false". Untrammelled by any consideration for accuracy, truth or even for human

dignity, it went further and "found" that petitioner, in publishing the letters, had attempted to "coerce" judges from "the fearless discharge of their duties" in the Ledyard Estate litigation although it was a matter of record before them that all litigation in that estate had been terminated more than a year and half before the first of the letters was published.

Finally, in a sputtering, muddy upheaval of bog-Irish bad-temper, this Gilbertian tribunal found that your petitioner, in publicly denouncing the judicial thieves (including themselves) who had connived at the spoliation of his children's birth-right, had been "guilty" of "gross moral turpitude".

That such grand climacteric ranting is irreconcilable with the fair and disinterested dispensation of justice implicit in the concept of due process cannot reasonably be questioned. And that due process, as well as common decency required the Appellate Division, under the circumstances and in the obscene trantrum it was in, to refer the matter to another forum cannot be questioned either.

Cooke v. *U. S.* 267 U. S. 517.

Cf. also the last paragraph of the dissenting opinion in *Bridges* v. *California, supra.*

It is elementary that in a proceeding of this character, your petitioner was entitled to be advised of the issues which he would be required to meet. The truth of his statements was certainly not one of the issues raised by the Association in its Petition. On the contrary, that body was only too careful to side-step raising that issue and has so remained to this day.

The Appellate Division, First Department, itself laid down the law in connection with an anomaly of this kind succinctly in *Matter of Goebel,* 263 A. D. 516, 1942 where it stated:

> "We think that prejudicial error was committed by the Surrogate in determining the validity of the check upon a ground which the parties did not urge. 'Parties come to Court to try the issues made by the pleadings and Courts have no right impromptu to make new issues for them on the trial, to their surprise or prejudice *or found judgments on grounds not put in issue* and distinctly and fairly litigated'. (*Wright* v. *Delafield*, 25 N. Y. 266, 270. See also, *Southwick* v. *First National Bank of Memphis*, 84 N. Y. 420-428; *McNeil* v. *Cobb*, 186 A. D. 177, affd. 230 N. Y. 536.)"

And as Mr. Justice Murphy of this Court quoted in *Thornhill* v. *Alabama*, 310 U. S. 88 (p. 96):

> "Conviction upon a charge not made would be sheer denial of due process." Citing *Dejonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359.

POINT IV.

The Association was wholly without authority under the terms of its by-laws to have instituted the proceeding in the circumstances in which it did institute it and its being permitted by the Court below to do so was, therefore, a violation of due process and constituted so drastic a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This proceeding was instituted against petitioner by the Association although no investigation into the charges upon which it is based had been conducted by its Committee on Grievances as provided by Section 6, paragraph

2, subd. B of its By-laws which requires that such an investigation must have been conducted upon due notice to the accused and in his presence.

The only exception to the above procedure allowed by the By-laws of the petitioner is set forth in Section 16, paragraph 3, wherein it is provided that the Executive Committee of the Association may waive the preliminary investigation where "the public interest requires prompt action".

It cannot be claimed that the Executive Committee sought to act in this case under this exception since the substance of all the publications of petitioner which allegedly constitute professional misconduct was contained in the first of those publications, to wit, the letter of December 10th, 1940 (Cf. Record p. 13) to the Committee on Grievances of the Association which was received by it, as well as the members of the Executive Committee more than twelve months prior to the institution of this proceeding.

It cannot be claimed by the Executive Committee that this proceeding was based upon the necessity for "prompt action" in view of the fact that during the entire twelve months, the Grievance Committee, as well as itself, made no attempt whatever to investigate the truth and justifiability of that communication and for a period of more than three months after its publication, wholly ignored it, even to the extent of refraining from acknowledging its receipt.

It thus appears that this proceeding was instituted against petitioner without any preliminary investigation whatever into the propriety of the charges against him having been made either by the Appellate Division as required of it by law or by the Grievance Committee of the Bar Association as required of it by law.

The explanation of this phenomenon is, of course, not as mysterious as it at first glance appears. Since clearly,

such a "preliminary investigation" by either the Court or the Association would necessarily have involved *both* of those institutions in the acutely embarrassing dilemma of passing judgment upon the conduct and integrity of their own members.

And it is an unquestionable fact that although petitioner's letters, which were sworn to by him, presented in the most fulsome detail inarguable evidence of the corruption of the Judges named by him and of the lawyers named by him, neither the Appellate Division, First Department nor the Grievance Committee or any other Committee of the Association has to this day made the slightest move towards investigating these accusations.

CONCLUSION.

For the reasons above stated, therefore, petitioner respectfully urges that the petition for certiorari in the instant case should be granted.

Dated, October 27th, 1943.

RICHARD KNIGHT,
Petitioner in Person,
32 Broadway,
New York City,
New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 462.

IN THE MATTER

of

RICHARD A. KNIGHT, An Attorney.

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CAHILL,
Attorney for the Association of the Bar of the City of New York,
63 Wall Street.
New York, N. Y.

Of Counsel
FRANCIS A. FULLAM, JR.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE MATTER

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BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion disbarring petitioner is reported in 264 App. Div. 106 (First Dept., 1942).

Petitioner's motion in the Appellate Division for leave to appeal to the Court of Appeals was denied by order reported in 264 App. Div. 852 (First Dept., 1942). Petitioner's motion in the Court of Appeals for leave to appeal to that court was denied by order reported in 289 N. Y. (No. 187) i (1942) (Advance Sheets).

A motion of the Bar Association to dismiss the appeal to the Court of Appeals purportedly made as of right by petitioner was granted by an order reported at 290 N. Y. 327 (1943) (Advance Sheets).

Questions Sought to Be Raised.

1. Whether the proceeding in which petitioner was disbarred was initiated and conducted in accordance with the requirements of due process.

2. Whether the order disbarring petitioner violated his right of free speech.

Statutes Involved.

Sections 88 and 476 of the Judiciary Law, enacted as Chapter 30 of the Consolidated Laws of New York by L. 1909, c. 35, the relevant portions of which are set out below.

Statement.

Petitioner seeks to have this Court review on alleged constitutional grounds a unanimous order dated May 8, 1942, of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, disbarring the petitioner from practicing law in the State of New York for conduct prejudicial to the administration of justice (R. 2 to 4).

Two applications for review of the disbarment order by the Court of Appeals of the State of New York have been denied and an appeal therefrom, allegedly taken as of right, has been dismissed by that court (R. 267, 277).

The disciplinary proceeding below was occasioned by petitioner's writing and wide publication of six documents containing grave charges against judges of courts of the State of New York (R. 6 to 113, 117 to 121, 239 to 250). These documents charged the judges with gross corruption in the performance of their judicial functions. Selected

specimens of these charges against the judiciary of the State of New York are set forth in the *per curiam* opinion of the court upon which the order disbarring the petitioner was made (R. 245 to 246).

Prior to the commencement of the disciplinary proceeding and shortly after publication of certain of the documents containing the charges made by the petitioner against the judiciary of the State of New York, the Appellate Division of the Supreme Court of the State of New York, First Department, by an order dated April 28, 1941, caused a judicial inquiry to be made into the charges which were being publicly uttered by the petitioner. This proceeding was conducted before Honorable Samuel I. Rosenman, a Justice of the Supreme Court of the State of New York. In the report, dated July 30, 1941, made and filed by Mr. Justice Rosenman in said proceeding, it was recommended that disciplinary action be taken against the petitioner by reason of his writing and wide publication of the aforesaid charges (R. 7 to 8, 87, 101).

Accordingly, the Executive Committee of the Association of the Bar of the City of New York appointed John T. Cahill as its attorney to commence this disciplinary proceeding under Sections 88 and 476 of the Judiciary Law of the State of New York. Petitioner was personally served with a notice of motion and petition, verified December 24, 1941, returnable before the Appellate Division of the Supreme Court of the State of New York, First Department, on January 9, 1942 (R. 5 to 11, 114 to 115, 116, 122, 223, 250, 268 to 269, 271 to 272).

The petition in the disciplinary proceedings charged the petitioner herein with conduct prejudicial to the administration of justice by reason of his writing and wide publication of the six documents annexed to such petition containing

attacks on the integrity of judges of courts of the State of New York (R. 6 to 113, 117 to 121, 243 to 244).

Upon consideration of said petition, the Appellate Division, by its order dated January 31, 1942, designated the Honorable Charles B. Sears, Official Referee of the Court of Appeals of the State of New York, to take testimony with respect to said charges of professional misconduct on the part of the petitioner herein and to report thereon to that court (R. 114 to 115).

The hearing before the Official Referee was held on March 10, 1942, on notice to the petitioner (R. 116 to 117). The petitioner did not appear at this hearing, either in person or by counsel (R. 117, 250).

In his report, dated March 23, 1942, the Official Referee found that the evidence adduced established the writing and wide publication by the petitioner herein of each of the six documents annexed as Exhibits "A" to "F" to the petition. The Official Referee further found the petitioner herein guilty of conduct prejudicial to the administration of justice as charged in the petition (R. 117 to 121).

Upon the filing of this report, the Bar Association moved for its confirmation, and the petitioner herein submitted an affidavit in opposition to such confirmation (R. 220 to 221, 222 to 238). In a *per curiam* opinion, the petitioner herein was found unfit to continue as a member of the Bar of the State of New York, and it was directed that he be disbarred (R. 239 to 250). The order of disbarment, dated May 8, 1942, was made and entered on such opinion (R. 2 to 4).

After entry and service of the unanimous order of disbarment, the petitioner made a motion in the Appellate

Division for leave to appeal to the Court of Appeals of the State of New York. That motion was denied by unanimous order of the Appellate Division, dated June 19, 1942 (R. 267).

Thereafter, the petitioner made a motion in the Court of Appeals of the State of New York for leave to appeal to that court. Such leave to appeal was denied by an order of the Court of Appeals dated October 8, 1942 (R. 267).

On July 7, 1942, the petitioner had also served a notice of appeal, dated June 23, 1942, from the unanimous order of disbarment, thereby purporting to institute an appeal to the Court of Appeals of the State of New York as of right. On motion of the Bar Association, and after hearing thereon, this appeal was dismissed by an order dated June 10, 1943, of the Court of Appeals, on the ground that no substantial constitutional question was involved (R. 267, 277).

POINT I.

The petition herein does not raise a substantial Federal question.

The power of the courts of the State of New York to discipline attorneys admitted to practice before them is not open to question. So long as the requirements of due process of law are observed in the sense that the attorney concerned is given notice and an opportunity to be heard, it is clear that this Court will not review the determination of the state court with respect to the qualifications of that attorney to practice before it. *Selling* v. *Radford,* 243 U. S. 46 (1917); *Keeley* v. *Evans,* 271 Fed. 520 (D. Ore. 1921), *appeal dismissed* 257 U. S. 667 (1922).

A. Petitioner was accorded due process of law.

i. The disciplinary proceeding was conducted pursuant to statutes fulfilling all requirements of due process.

The disciplinary proceeding resulting in the petitioner's disbarment was a statutory proceeding under the provisions of Sections 88 and 476 of the Judiciary Law of the State of New York, commenced by the Bar Association in accordance with the recommendation of the court in the judicial inquiry which had previously been made concerning the charges the petitioner was making against the New York judiciary (R. 7 to 8, 87, 101).

The applicable provisions of Sections 88 and 476 of the Judiciary Law of the State of New York read as follows:

> "§88. *Admission to and removal from practice by appellate division*
>
> * * * * * *
>
> 2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.
>
> "§476. *Suspension or removal of attorney must be on notice*

Before an attorney or counsellor at law is suspended or removed as prescribed in section eighty-eight of this chapter, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any district attorney within a department, when so designated by the presiding justice of the appellate division of the supreme court, to prosecute all proceedings for the removal or suspension of attorneys and counsellors at law or the said presiding justice may, in a county wholly included within a city or in a county having a population of over three hundred thousand inhabitants, appoint an attorney and counsellor at law, designated by a duly incorporated bar association approved by him, to prosecute any such proceedings and, upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor at law for the services rendered under such designation, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

In all cases where the charges are served in any manner other than personally, and the attorney and counsellor at law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, decree or final order of suspension or removal and upon good cause shown and upon such terms as may be deemed just by such presiding justice such

attorney and counsellor at law must be allowed to defend himself against such charges."

The requirements of due process are satisfied by the provisions of the statutes quoted above directing that a copy of the charges preferred be served upon the attorney personally (or by mail, or by publication or otherwise, as the presiding justice of the appellate division may direct in a proper case), and that he be given an opportunity to be heard in his defense (Section 476 of the Judiciary Law of the State of New York, *supra*).

ii. The requirements of due process contained in the applicable statutes were complied with in the disciplinary proceeding.

In his application for certiorari the petitioner does not raise any issue either as to service of the charges upon him, or as to the opportunity of being heard in his own defense. He does not challenge the fact that he was personally served with the charges preferred against him and that he received notice of the time and place of all court proceedings with respect to such charges, including the return date of the original petition, the hearing before the Official Referee designated to take testimony and report to the court on the charges preferred, and the return date on the motion to confirm the Official Referee's Report wherein the petitioner was found guilty of conduct prejudicial to the administration of justice on all six of the documented charges set forth in the original petition.

The petitioner complains that the disciplinary proceeding below was initiated by notice of motion and verified petition, rather than by an order to show cause, a procedural distinction without a difference.

Since at least 1912, when Sections 88 and 476 of the Judiciary Law of the State of New York were enacted sub-

stantially in their present form, the Bar Association has consistently presented charges of professional misconduct against attorneys to the court by way of petition, setting forth the charges and notice of motion thereon. The following excerpt taken from the opinion of the Court of Appeals in *Matter of Dolphin,* 240 N. Y. 89 (1925), removes all doubt about the current practice:

> "The association is incorporated and its purposes as defined by the act of incorporation are, amongst others, those of 'facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession.' It is a matter of common knowledge that under these powers and through appropriate organization it has done constant and valuable work in maintaining the ethical standards of the legal profession in New York City and in bringing to the attention of the Appellate Division various members of the profession who, in its opinion, had violated those standards and were deserving of discipline. Such work has been ordinarily done as it was in this case by presenting to the court a petition alleging misconduct of an offending member and, if the court thought that a sufficient cause for so doing was presented, by prosecuting charges before a referee on whose report, if adverse to the attorney, the matter would be brought before the court for final disposition." (p. 93)

In any event, the attempted distinction between a verified petition and notice of motion and an order to show cause presents no constitutional question to this Court.

In like manner, the questions which the petitioner raises in his application as to whether counsel for the Bar Association acted pursuant to formal designation of the presiding justice of the Appellate Division, and whether the initiation of the disciplinary proceeding by the Bar Association

should have been authorized by its Grievance Committee, rather than by its Executive Committee, present narrow procedural issues having nothing whatever to do with any substantial constitutional issue of due process.

Moreover, the regularity of the disciplinary proceeding has been twice reviewed by the Court of Appeals of the State of New York. That Court, after review of the record, denied the petitioner's application for leave to appeal from the unanimous disbarment order and in a second review dismissed an appeal therefrom taken purportedly as of right *on the ground that no substantial constitutional question was presented by the record* (R. 267, 277).

Finally, petitioner, in Point III of his brief, seeks to avail himself of the fact that in the six documents on which the charges against him were based, he attacked the Appellate Division, First Department, in which Department all of the documents were written and published. Petitioner argues that thereby the Appellate Division was disqualified. Petitioner does not call attention to the fact that in another document, marked for identification in this record, he also assailed the integrity and honesty of the judges of the Court of Appeals (R. 164). Petitioner's argument seems to assume that if he attacks enough judges and enough courts, he can thereby escape the discipline which his acts would otherwise entail. By parity of reasoning, if the integrity of *all* the courts of the United States were attacked by a lawyer, who when given his day in court to prove his charges failed even to present himself, then such a lawyer would forever be immune from professional accountability.

B. Petitioner's rights of free speech were not infringed.

The law is clear that the petitioner, in the disciplinary proceeding against him, had the burden of establishing the

truth of his vicious attacks on the honesty and integrity of the judges of the New York courts.

The case of *In re Murray*, 11 N. Y. Supp. 336, 58 Hun 604 (Gen. Term, 1st Dept., 1890) is precisely in point. In that case, an attorney had charged a Surrogate with being an infamous, foresworn and corrupt judge. In disciplinary proceedings brought against him for this conduct he failed to offer evidence, other than by allegations in an affidavit, of the truth of the charges and was disbarred. The Court in its opinion stated:

> "The charges are most serious in character, and would be attended with the gravest results if established. They should not therefore be entertained for a moment *except upon the most impressive evidence at least, and then only in the manner provided by law for the investigation of kindred accusations against judicial officers.* These results impose the greatest and most scrupulous care even in an attempted impeachment of a judicial officer, and if a counselor of this court, disregarding that mode of procedure, makes the charge of corruption against an officer in his own court, while sitting in a case which he is investigating, his conduct is in the highest degree unprofessional and improper. If such a performance should be tolerated, *when every presumption of law is against the truth of the accusation*, the honor of judicial officers would be exposed to the malice or rage of disappointed attorneys whose evil inclinations, anger or passion would thus seek its gratification. * * *" (p. 336) (Italics supplied.)

The *Murray* case was followed in *Bar Association of San Francisco* v. *Philbrook*, 170 Pac. 440 (Dist. Ct. of Appeals, 1st Dist. Cal., 1917) where an attorney had made attacks on the integrity and honesty of various judges and accused them of joining with members of the Bar in a

criminal conspiracy. He was charged with unprofessional conduct for violation of his duty to maintain the respect due to courts of justice. He refused to make any defense on the merits to the charges. The Court, citing *In re Murray, supra,* with approval, disbarred the attorney stating that such conduct on the part of an attorney:

> "* * * affords ample ground for the permanent disbarment of such a person, especially when neither justification, withdrawal, mitigation, or excuse for the making and filing of such a document has been proffered by the respondent in the proceedings now pending before us." (p. 442)

Again in the case of *Cobb* v. *U. S.,* 172 Fed. 641 (C. C. A. 9th, 1909), an attorney procured publication of an article attacking the reputation of a judge. He asserted that the article was not willfully or maliciously or otherwise false or untrue, but failed and refused to adduce any evidence to justify the attacks he had made. The appellate court, in sustaining an order suspending him from practice for eighteen months, stated:

> "The plaintiff in error admitted in his answer that he wrote the communication and sent the same to the publisher, but he denied that he did so willfully or maliciously, or that the article was willfully or maliciously or otherwise false or untrue, or that he had any intent to scandalize or traduce or disgrace the court. Upon the issue so raised, the plaintiff in error might, had he so chosen, have adduced testimony to sustain his denials, but upon the refusal of the court to refer the case to a committee of three members of the bar the plaintiff in error by his counsel announced in open court that he would not further appear in the case, or have anything further to do with the same. The burden was upon him to show that statements made in the communication

> which were scandalous upon their face were not maliciously or willfully published, or were not false, and he cannot complain that upon his refusal to sustain such burden of proof, or to adduce any testimony whatever, the court took the information to be true. (p. 644)
>
> * * * * * *
>
> "These are charges which no attorney with a proper sense of his professional duty would make unless he were prepared to prove and sustain them." (p. 645)

It is thus apparent, both from the application for certiorari and from the record below, that there is no issue of freedom of speech involved in this case. The petitioner has been disciplined by a court of competent jurisdiction, after notice and a full opportunity to be heard in his defense, for his behavior in making and widely publishing scurrilous attacks upon the integrity of the judges of the courts of the State of New York, for the making and publishing of which he failed, when given the opportunity, to offer any evidence whatever either in justification or mitigation.

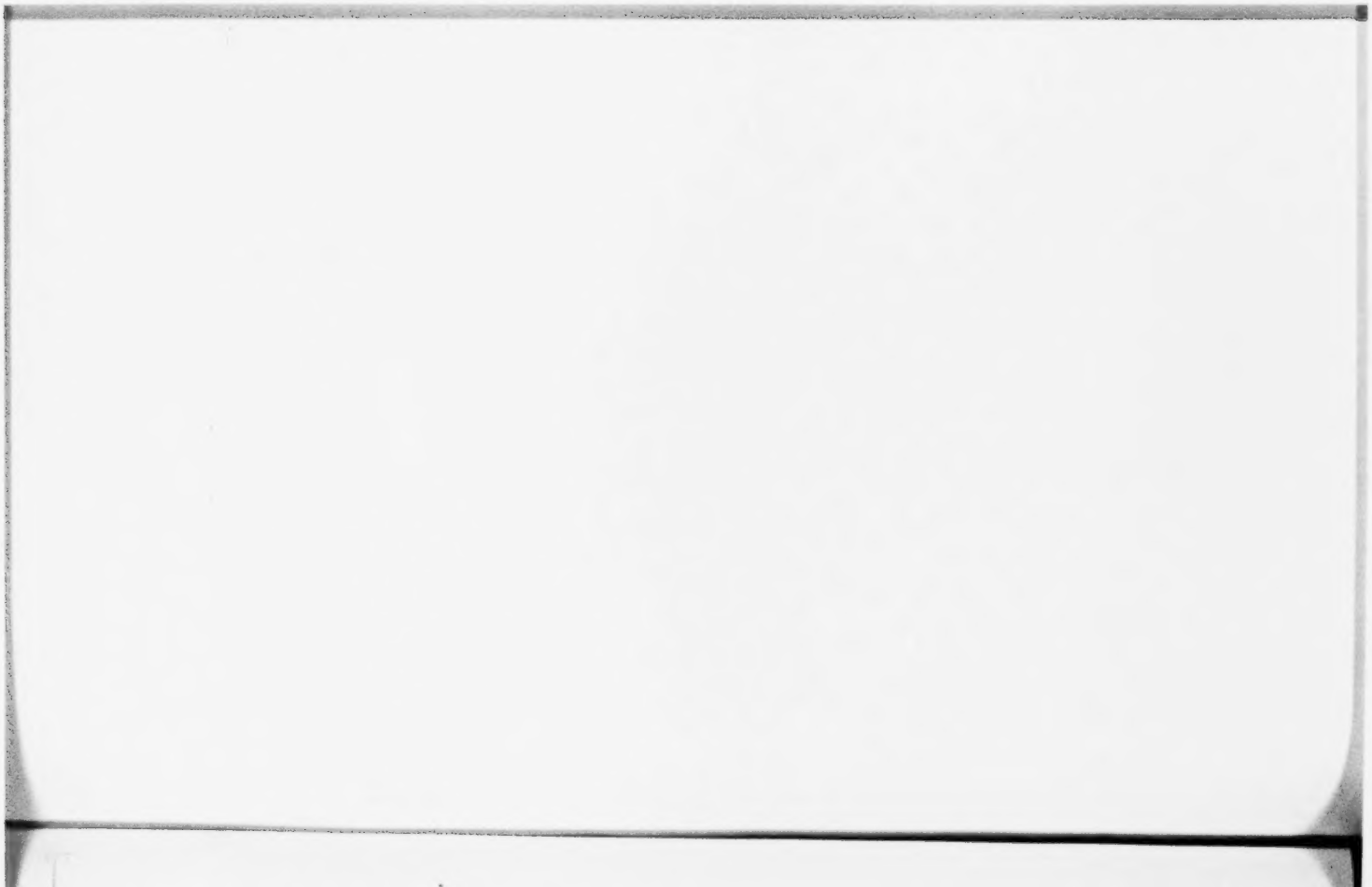
Conclusion.

The application to this Court for a writ of certiorari is wanting in merit and should therefore be denied.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for the Association
of the Bar of the City of
New York.

Of Counsel
FRANCIS A. FULLAM, JR.



(16)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 462.

RICHARD A. KNIGHT,

Petitioner,

AGAINST

THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

Reply Brief in Support of Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

RICHARD KNIGHT,
Petitioner in Person,
No. 32 Broadway,
New York, N. Y.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

No. 462.

Reply Brief in Support of Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

A.

In respect of Petitioner's Point II that there was a violation of his right to due process by reason of the Appellate Division's having entertained a disciplinary proceeding instituted by the Association with a Notice of Motion instead of by the Court itself with an Order to Show Cause, the attempt is made by the Association in Point I—A ii (p. 8) of its answering brief to dismiss petitioner's argument with the airy statement that it raises "a procedural distinction without a difference". It is hereby respectfully suggested, however, that it does no such thing. No question of procedure is even suggested by it.

The point is that the Association was wholly without power, *as a matter of substantive law,* to institute the

proceeding by *any* procedure whatever,—as wholly without such power as any other association, club or civic body or individual would have been,—and that the Appellate Division was, therefore, wholly without jurisdiction to entertain and conduct the proceeding.

The power to institute such a proceeding against a lawyer is allocated by *statute* to the Appellate Division exclusively, just as the power to conduct a similar proceeding against an accountant or a dentist is allocated by statute to the Board of Regents of the University of the State of New York.

Under such circumstances, it is as preposterous for the Association to claim that it has a legal right to institute a proceeding of this kind against a lawyer as it would be for it to claim it had the right to institute a similar one against an accountant or a dentist.

And for the Court, having had the circumstances called to its attention by petitioner's motion to dismiss made at the beginning of the proceeding, nevertheless to have proceeded with it and to have made a decree in it is precisely as preposterous as would have been its conduct if, in a proceeding for divorce and custody instituted by a Mrs. Smith of New Jersey against a Mr. Jones of Connecticut, who and whose children had never seen and/or heard of Mrs. Smith, it had proceeded to take evidence and enter a decree awarding the divorce and the custody to Mrs. Smith even though, at the commencement of the proceeding, Mr. Jones had appeared specially and laid the undenied facts before it in a motion to dismiss.

The Brief of the Association attempts to offer no justification whatever for its having arrogated to itself a power not only not given to it by law, but specifically denied it by law other than that (p. 8) "since at least 1912 when Sections 88 and 476 of the Judiciary Law of the State of New York were enacted substantially in their present form, (*sic*) the Bar Association has consistently

presented charges of professional misconduct—by way of petition—and notice of motion thereon". Insofar as this quoted statement implies that in 1912 some change was made in those portions of Sections 88 and 476 of the Judiciary Law pertaining to the question here presented, which tended to justify the conduct of the Association, the statement is intentionally deceptive since, in fact, no such change has been made since prior to the year 1877.

And its statement (p. 9) that the Court of Appeals in *Matter of Dolphin,* 240 N. Y. 89 (1925) "removes all doubt about the current practice" being as the Association contends it is, is likewise deliberately deceptive since *Matter of Dolphin* clearly holds precisely the reverse.

It is elementary that a decree in a proceeding which a Court is without authority to entertain is a total nullity.

In *Matter of Will of Walker,* 126 N. Y. 20 (1892), cited in our original brief, the Court of Appeals said:

> "The objections to this decree are jurisdictional. The consent of the parties is not sufficient to avoid their fatal effect. Wherever there is a want of authority to hear and determine the subject matter of the controversy, an adjudication upon the merits is a nullity and does not estop an assenting party. Citing 8 N. Y. 245—*Chemung Canal Bank* v. *Judson.*"

In *Matter of Doey,* 224 N. Y. 30 (1918), the same Court held (p. 38):

> "The rule is well settled that a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise jurisdiction in a case to which the statute has no application, does not acquire jurisdiction and its judgment or determination when made is a nullity and will be so

> treated whenever called in question by either a direct or collateral attack. (*Risley* v. *Phenix Bank of the City of New York*, 83 N. Y. 318; *State of Rhode Island* v. *Comm. Massachusetts*, 12 Peters 657.)"

The same position was taken by the Court in *Matter of Newham* v. *Chile Exploration Co.*, 232 N. Y. 37 (1921). *Cf.* also *Matter of Samson*, 265 A. D. 259 (1942), cited and digested in full in our original brief (p. 19).

B.

The only answer the Association has proved able to make to the petitioner's claim that his rights to free speech and to a free press have been abridged by the interpretation put by the court below on the statute involved is that (p. 10) "The law is clear that the petitioner * * * had the burden of establishing the truth of his vicious (*sic*) attacks on the honesty and integrity of the judges of the New York courts."

This position, however, the Association has failed to sustain by the citation of a single decision of a court of superior jurisdiction, those decisions being uniform that an attorney is disciplinable only for those attacks on the judiciary which are deliberately false or made "without reasonable grounds".

That this is the law in New York was clearly laid down in *Matter of Bevans*, 222 A. D. 701 (1927) where in a disciplinary proceeding brought against a lawyer for instituting an action against various persons, including a judge, all of whom he accused of corruption, the Appellate Division, Third Department, held:

> " * * * no attorney is justified in bringing an action against any person or group of persons *without reasonable grounds* therefor * * *. The question

of fact then is *whether the respondent had reasonable grounds* to institute said action for conspiracy."

In that case, as in all similar cases recorded in the reports of the State, the attorney was disciplined *only* upon the finding of the Referee that his attacks upon the members of the judiciary "are and were wholly and utterly false and untrue" and that he himself had "no reasonable or just grounds to believe the said charge so made to be true".

In the very case principally relied on here by the Association to sustain its position, namely, *Cobb* v. *U. S.*, 172 Fed. 642 (C. C. A. 9th, 1909), the charges filed against the attorney involved squarely contained the allegation that his accusations were "willfully and maliciously false" and the Court, in the opinion upon which his disbarment was based, specifically found that the accusations were "false, scurrilous and libelous".

Although the Association, in its answering brief, has at last characterized petitioner's letters (top line, p. 11) as "vicious" and (15th line, p. 13) as "scurrilous", it is significant that those characterizations are the first it has to date indulged in, its original charges having been scrupulously free from any imputation that the publications of petitioner were vicious, scurrilous or, most of all, false, since it well knew that such an imputation would have elicited complete proof of the truth of the publications to the cost of its own principal officers.

As to the statement in the last paragraph on page 13 of the answering brief that "The petitioner has been disciplined * * * for his behavior in making and widely publishing scurrilous attacks upon the integrity of the judges of the Courts of the State of New York for the making and publishing of which he failed, when given the opportunity *to offer any evidence whatever* either in justifi-

cation or mitigation", the record clearly discloses that the quoted statement is untrue.

To the Appellate Division, on the motion to confirm the Report of the Referee, petitioner submitted an affidavit (Rec. p. 227) in which he unqualifiedly swore that every statement he had made about a judge in the published letters was true (Rec. p. 235, fols. 707, *et seq.*) and challenged the Association not only to specify any statement in them which was untrue but himself specified a series of especially significant statements he had made which he believed required the Court to elicit some denial on the part of the Association.

As was pointed out in our original brief, the Association obtained two adjournments of the return day of the motion upon which this affidavit of your petitioner was submitted in which to file an answer to it and finally never voluntarily filed any such answer and was never required by the Appellate Division to do so.

CONCLUSION.

Petitioner respectfully urges that the petition for certiorari in the instant case should be granted.

Dated, December 1st, 1943.

RICHARD KNIGHT,
Petitioner in Person,
32 Broadway,
New York City, New York.

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 462.

RICHARD A. KNIGHT,

Petitioner,

AGAINST

THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

Petition for Rehearing of Application for Writ of Certiorari.

RICHARD A. KNIGHT,
Petitioner in Person,
Office & P. O. Address,
No. 32 Broadway,
Borough of Manhattan,
City of New York.

LOUIS APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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CASE CITED.

STATUTE CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

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To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:

Comes now, Richard Knight and respectfully petitions this Honorable Court for a rehearing of his petition for a writ of certiorari to review the decree of the Appellate Division, First Department of the Supreme Court of the State of New York as affirmed by the Court of Appeals of the State of New York, whereby petitioner was disbarred from the practice of law in that State under an alleged authority claimed by respondent and by the said Appellate Division to be derived by it from the provisions of the New York Judiciary Law, Sections 88 and 476.

The sole charge adduced against petitioner was that he had violated a prohibition of that statute by indulging, to quote its exact words, in "conduct prejudicial to the administration of justice" by reason of the fact that *after* the termination of extensive litigation in which he had represented the interests of his wife and children as an attorney, he published derogatory statements concerning the conduct of various judges who had functioned as such in the course of that litigation. Not one of these statements, however, was charged by respondent or sought by it to be proved to have been untrue or unjustified or possibly designed by petitioner to have affected, in any way, the conduct or disposition of that litigation.

As appears from the analysis of the law and the facts set forth under Point II of petitioner's original Petition and Brief to this Court, moreover, there was, in the conduct and disposition below of the disbarment proceeding, as total a disregard, both by the Courts and by respondent, of petitioner's constitutional right of due process of law as would have been the service of a summons by telegraph or the entry of a judgment by one Court on evidence adduced before another in a case in which both, as a matter of law, were wholly without jurisdiction.

The petition was submitted to this Court under No. 462 of the October Term, 1943 and was denied by order filed December 13th, 1943.

The denial by the New York Courts in this case of petitioner's rights of free speech and free press and to due process was in such improbably blatant and insolent disregard of law and even of the crudest standards of common honesty that no other theory respecting this Court's refusal[1] to interest itself in the matter suggests itself so promptly or so satisfyingly as that that refusal

1. Unanimous, except in the person of Mr. Justice Murphy, who disagreed with the balance of its body from the start and voted for the granting of the writ sought.

is attributable simply to the Court's total incredulity or total misapprehension of the facts of the case as adduced by petitioner in his Brief and its consequent dismissal of the entire matter without further consideration.

As those facts, however, are not only incontrovertible but as, in addition, no pretense even of controverting them has been or will be resorted to by respondent, petitioner is making this application for a rehearing in the hope of fully awakening the Court's consciousness to them and thereby eliciting from it that application of the law which it, in almost its exact present personnel, has specifically and unanimously found in the *Bridges* case (314 U. S. 252) to be absolutely required by them.

I.

A writ was granted in the *Bridges* case because, in the words of Mr. Justice Black,[1] "the importance of the constitutional question prompted" it. Since the constitutional question in that case is identical with the constitutional question in this, it is difficult to believe that this Court, if only its attention can here be effectually attracted and held, will insist upon maintaining the position that the question, in fact, is not of the slightest importance and that the solemn pronouncements in the *Bridges* case of both Mr. Justice Black in the majority opinion and Mr. Justice Frankfurter in his dissenting opinion are in no way binding upon it and afford no real assurance or protection whatever to any citizen who may have relied or who may yet rely upon them.

This, nevertheless, is unquestionably the position which, by the inescapable implication of its original denial of the writ here sought, this Court currently occupies.

For wholly nugatory have been rendered by that denial, the opinions of both Mr. Justice Black and Mr. Justice

1. In the majority opinion therein.

Frankfurter and wholly meaningless have become, for practical purposes, such uncompromising phrases of Mr. Justice Frankfurter, concurred in by the Chief Justice and Mr. Justice Roberts, as the following:

> "In a series of opinions, as uncompromising as any in its history, this Court has settled that the fullest opportunities for free discussion are implicit in the concept of ordered liberty and thus through the Fourteenth Amendment protected against attempted invasion by the States. * * * The channels of inquiry and thought must be kept open to new conquests of reason however odious their expression may be to the prevailing climate of opinion."
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> * * * * * *
>
> "Of course, freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. *Particularly should this freedom be employed in comment upon the work of Courts* who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power.
>
> "Some English judges extended their authority for checking interferences with judicial business actually in hand, to 'lay by the heel' those responsible for 'scandalizing the Court,' that is, bringing it into general disrepute. *Such foolishness* has long since been disavowed in England and *has never found lodgment here.*" (Italics mine.)
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> * * * * * *
>
> "That a State may, under appropriate circumstances, prevent interference with specific exercises of the process of impartial adjudication *does not mean that its people lose the right to condemn decisions or the judges who render them.* Judges as

persons or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. * * * There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore, judges must be kept mindful of their limitations and of their ultimate public responsibility *by a vigorous stream of criticism expressed with candor however blunt.* 'A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, *any more than he can for exciting public feeling against a judge for what he already has done'.*" (Italics mine.)

* * * * * *

"Courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint and by good taste. Winds of doctrine should freely flow for the promotion of good and the correction of evil. Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen *regardless of the temper or the truth of what may be uttered.*" (Italics mine.)

* * * * * *

"A publication intended to teach the judge a * * * lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power."

* * * * * *

"If a rule of state law is not confined to the evil which may be dealt with but places an indis-

> criminate ban on public expression that operates as an overhanging threat to free discussion, it must fall without regard to the facts of the particular case. *This is true whether the rule of law be declared in a statute or in a decision of a court.*
>
> "Comment after the imposition of sentence-criticism, however unrestrained of its severity or lenience or disparity, * * * is an exercise of the right of free discussion."

In a recent decision of this Court, written by Mr. Justice Roberts and concurred in by Mr. Justice Frankfurter, appears the ominous statement:

> "The tendency to disregard precedents * * * has become so strong in this Court of late as, in my view, to shake confidence in the consistency of decision and leave the courts below on an unchartered sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow."

Mr. Justice Roberts' unqualified concurrence in the opinion of Mr. Justice Frankfurter in the *Bridges* case, considered in the light of the foregoing statement of his own, concurred in by Mr. Justice Frankfurter, makes it next to impossible to believe that when those Honorable Justices voted against granting the writ here sought by petitioner, either of them could have been aware that the facts in this case and the law necessarily applicable thereto bring it squarely within the principles laid down by Mr. Justice Frankfurter, with Mr. Justice Roberts' concurrence, in the *Bridges* case.

Among all the statements pertaining to this case contained in Mr. Justice Frankfurter's opinion and concurred in by Mr. Justice Roberts and the Chief Justice, however,

incomparably the most significant to petitioner's present argument is the succinct and unqualified apophthegm:

> "The Due Process Clause of the Fourteenth Amendment protects the right to comment on a judicial proceeding *so long as this is not done in a manner interfering with the impartial disposition of a litigation.*"

As it is conceded by the respondent in this case that the comments of petitioner on the judicial proceedings in the litigation in New York State which precipitated this matter in no way interfered or were designed to interfere or *could* have interfered with the impartial disposition of that litigation, it is difficult to imagine how Mr. Justice Frankfurter or the Chief Justice or Mr. Justice Roberts or any other member of this Honorable Court could have, in view of the last quoted statement of the law and in view of the facts of this case, failed to vote for granting the writ of certiorari here sought by the petitioner except through a complete misapprehension of those facts or a complete disbelief in the petitioner's assertion of them.

And with that misapprehension and/or disbelief dispelled by the reiteration here made of those facts, it is, of course, quite beyond imagining that those Honorable Justices will not now immediately recognize the identity between this case and the *Bridges* case and thereupon alter their original position herein accordingly so as to conform it with that taken by Mr. Justice Murphy from the beginning.

For it is beyond argument that what this Honorable Court has done in refusing the writ of certiorari here is not only to disaffirm every word in the opinions of Mr. Justice Black and Mr. Justice Frankfurter in the *Bridges* case but, in addition, specifically to confirm the preposterous position taken by the Association of the Bar of

the City of New York that, the Fourteenth Amendment to the contrary notwithstanding, no lawyer in America may comment, either by word of mouth or in print, upon the conduct or determination of any Court in this country without incurring the possible penalty of being summarily disbarred for such comment *irrespective of any question of its truth or justifiability.*

As lawyers are obviously better qualified than any other class of the populace to comment intelligently on the conduct and determinations of judges and as they are certainly the most likely class to have occasion to do so, the denial by this Court of the writ here sought is tantamount to a complete insulation by it of all the Courts in this country against any derogatory comment of a professionally informed character whatever.

It is, of course, not conceivable that this Court contemplated any such absurd result as this from its failure to grant the writ here.

But even if it did, it would still be unthinkable that it would undertake to make so immeasurably drastic an exception to the principles laid down in the *Bridges* case and its long and perfectly consistent tale of forerunners without carefully setting forth, in a considered opinion, its reasons for doing so.

For a determination of such momentous and incalculable consequences should manifestly not be the product of what Mr. Justice Frankfurter has called a "careful silence".

II.

For as complete an analysis as petitioner is capable of making for his claim that his right to due process was disregarded in this matter by the Courts below, this Court is hereby referred to the discussion under Point II in petitioner's original brief.

The Court's attention is also directed, in this connection, to the fact, emphasized in Point III of petitioner's original brief that, in the total absence of a suggestion of proof or *even a charge* in the record submitted herein to the Appellate Division, First Department, that a single word published by petitioner was either false, malicious or otherwise unjustified, its Presiding Justice, Francis Martin, the fin de siecle ward-heeler who, among the gang of other biddable jackals currently composing that Court, effortlessly stands out as obtrusively as a dog-tick among mice-lice, unhesitatingly "found" in the "decision" he concocted in this proceeding that petitioner's publications were "malicious" and "false" and designed to "coerce" judges from the "fearless discharge of their duties" in a matter that, to this common liar's personal knowledge, had been judicially disposed of *months before* the drafting of the first of petitioner's publications!

That the conception of the due process is wholly irreconcilable with so incredible and impudent and pimp-shameless a display of deliberate dishonesty by a judge of a Court purporting to be controlled by that conception requires no pointing out here.

WHEREFORE, your petitioner prays that his petition for a writ of certiorari may be reheard and reconsidered.

And your petitioner will ever pray.

RICHARD A. KNIGHT,
Petitioner in Person,
Office & P. O. Address,
32 Broadway,
Borough of Manhattan,
City of New York.